

(2) When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification;

(3) The final denial shall include the name and title or position of the official responsible for the denial;

(4) In the case of appeals for total denial of records, the response shall advise the requester that the information being denied does not contain meaningful portions that are reasonably segregable;

(5) When the denial is based upon an exemption 3 statute, the response, in addition to citing the statute relied upon to deny the information, shall state whether a court has upheld the decision to withhold the information under the statute, and shall contain a concise description of the scope of the information withheld; or

(6) The response shall advise the requester of the right to judicial review.

(f) *Consultation.* Final refusal involving issues not previously resolved or that the Army Activity knows to be inconsistent with rulings of other DoD Components ordinarily should not be made before consultation with the Army OGC. Tentative decisions to deny records that raise new or significant legal issues of potential significance to other Agencies of the Government shall be provided to the Army OGC.

§518.18 Judicial actions.

(a) This section states current legal and procedural rules for the convenience of the reader. The statements of rules do not create rights or remedies not otherwise available, nor do they bind the DA or DoD to particular judicial interpretations or procedures. A requester may seek an order from a U.S. District Court to compel release of a record after administrative remedies have been exhausted; i.e., when refused a record by the head of a Component or an appellate designee or when the Army Activity has failed to respond

within the time limits prescribed by the FOIA and in this part.

(b) The requester may bring suit in the U.S. District Court in the district, in which the requester resides or is the requester's place of business, in the district in which the record is located, or in the District of Columbia.

(c) The burden of proof is on the Army Activity to justify its refusal to provide a record. The court shall evaluate the case *de novo* (anew) and may elect to examine any requested record in camera (in private) to determine whether the denial was justified.

(d) When an Army Activity has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, to include negotiating with the requester to modify the scope of their request, the court may retain jurisdiction and allow the Activity additional time to complete its review of the records.

(1) If the court determines that the requester's complaint is substantially correct, it may require the U. S. to pay reasonable attorney fees and other litigation costs.

(2) When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions whether Army Activity personnel acted arbitrarily and capriciously. In these cases, the special counsel of the Merit Systems Protection Board shall conduct an investigation to determine whether or not disciplinary action is warranted. The Army Activity is obligated to take the action recommended by the special counsel.

(3) The court may punish the responsible official for contempt when an Army Activity fails to comply with the court order to produce records that it determines have been withheld improperly.

(e) *Non-U. S. Government source information.* A requester may bring suit in an U.S. District Court to compel the release of records obtained from a non-government source or records based on information obtained from a non-government source. Such source shall be notified promptly of the court action.

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When the source advises that it is seeking court action to prevent release, the Army Activity shall defer answering or otherwise pleading to the complainant as long as permitted by the Court or until a decision is rendered in the court action of the source, whichever is sooner.

(f) *FOIA litigation.* Personnel responsible for processing FOIA requests at the DoD Component level shall be aware of litigation under the FOIA. Such information will provide management insights into the use of the nine exemptions by Component personnel. Whenever a complaint under the FOIA is filed in an U.S. District Court, the Army Activity named in the complaint shall forward a copy of the complaint by any means to HQDA, OTJAG (DAJA-LT), with an information copy to the Army OGC. In the DA, HQDA OTJAG (DAJA-LT), WASH D.C. 20310-2210 is also responsible for forwarding this information to the Office of the Army OGC and to the DA FOIA/PA Office.

(1) *Bases for FOIA Lawsuits.* In general, there are four categories of complaints in a FOIA lawsuit: failure to respond to a request within time frames established in the FOIA statute; challenge to the adequacy of search for responsive records; challenge to application of a FOIA Exemption; and procedural challenges, such as application of waiver of fees. The guidance below is intended to cover all categories of complaints. In responding to litigation support requests, bear in mind the type of complaint that has given rise to the lawsuit and provide information, which addresses the specific reason(s) for the complaint.

(2) *Responsibility for FOIA litigation.* For the Army, under the general oversight of the OGC, FOIA litigation is the responsibility of the General Litigation Branch, Army Litigation Division. If you are notified of a FOIA lawsuit involving the Army, contact the General Litigation Branch immediately at: U.S. Army Litigation Center, General Litigation Branch (JALS-LTG), 901 North Stuart Street, Suite 700, Arlington, VA 22203-1837. The General Litigation Branch will provide guidance on gathering information and assembling a

litigation report necessary to respond to FOIA litigation.

(3) *Litigation reports for FOIA lawsuits.* As with any lawsuit, the Army Litigation Division and DOJ will require a litigation report. This report should be prepared with the assistance, and under the supervision of, the legal advisor. For general guidance on litigation reports, see Army Regulation 27-40, paragraph 3-9. Unlike the usual 60-day time period to respond to complaints under the Federal Rules of Civil Procedure, complaints under the FOIA must be answered within 30 days of the service of the complaint. Therefore, it is imperative to contact the Litigation Division immediately and to begin preparing the litigation report without delay.

(4) *Specific guidance for FOIA litigation reports.* The following is specific guidance for preparing a litigation report in FOIA Litigation. The required material should be indexed and assembled under the following categories:

(i) *Statement of facts.* (Tab A). Provide a chronological statement of all facts related to the FOIA request, beginning with receipt of the request, responses to the request, and searches for responsive records. The statement of facts should refer to supporting enclosed exhibits whenever possible.

(ii) *Responses to pleadings.* (Tab B). If you have been provided a copy of the complaint, provide a line-by-line answer to the factual statements in the pleadings, along with recommendations on whether to admit or deny the allegation.

(iii) *Memorandum of law.* (Tab C). No memorandum of law is necessary in FOIA lawsuits. If records were withheld, provide a written statement explaining the FOIA Exemption used to withhold the information and the rationale for its application in the particular facts of your case. Include here a copy of any legal review regarding the withholding of the records.

(iv) *Potential witness information.* (Tab D). List the names, addresses, telephone number, facsimile number and e-mail addresses of all potential witnesses. At a minimum, this must include all of the following: the FOIA Officer or Coordinator or other person responsible for processing FOIA requests;

the individual(s) who actually conducted the search for responsive records; the legal advisor(s) who reviewed or provided advice on the request; and the point of contact at any office or agency to which the FOIA request was referred.

(v) *Exhibits.* (Tab E). Provide copies of all correspondence regarding the FOIA request. This includes all correspondence between the agency and the requester, including any enclosures; any referrals or forwarding of the request to other agencies or offices; copies of all documents released to the requester pursuant to the request in litigation. If any information is withheld or redacted, provide a complete copy of all withheld information. Identify withheld information by placing brackets around all information withheld and note in the margins of the document the specific FOIA exemption applied to deny release of the document; all records and correspondence forwarded to the IDA, if applicable; all appeals by the requester; if the withheld document is classified, provide a summary of each document withheld. The Summary of classified documents should include the following:

- (A) The classification of the document;
- (B) The date of the document;
- (C) The number of pages of the document;
- (D) The author or creator of the document;
- (E) The intended or actual recipient of the document;
- (F) The subject of the document and an unclassified description of the document sufficient to inform the court of the nature of the contents of the document; and
- (G) An explanation of the reason for withholding, including the specific provision(s) of Executive Order 12,958 which permit classification of the information.

(vi) *Draft declarations.* (Tab F). A declaration is a statement for use in litigation made under penalty of perjury pursuant to specific statutory authority (28 U.S.C. 1746) which need not be notarized. Declarations may be used by the Army to support a motion to dismiss or to grant summary judgment. Depending on the basis for the lawsuit,

with the assistance of their legal advisor, witnesses should prepare a draft declaration to be included with the litigation report.

(vii) The following is some general guidance on the content of a declaration in FOIA litigation. Identify the declarant and describe his or her qualifications and responsibilities as they relate to the FOIA; provide a statement indicating that the declarant is familiar with the specific request and the general subject matter of the records; include a statement of the searcher's understanding of the exact nature of the request, including any modification (narrowing or expanding the search based on communications with the requester); generally, the factual portion of the declaration should be organized as a chronological statement beginning with receipt of the request; provide a specific description of the system of records searched; and provide a description of procedures used to search for the requested records, (manual search of records, computer database search, etc.). This portion of the declaration is especially important when no records are found. The declaration must reflect an adequate and reasonable search for records in locations where responsive records are likely to be found.

(5) *Special guidance for initial denial authorities.* If any information was withheld, the IDA or person with specific knowledge of the withholding must provide a specific statement of any Exemptions to the FOIA, which were applied to the records.

(i) *Withheld records.* For withheld records, describe in reasonably specific detail all records or parts of records withheld. If the number of records is extensive, use an index of the records and consider numbering the documents to facilitate reference. It is also permissible (and frequently helpful) to include redacted portions of records withheld as attachments or exhibits to the declarations.

(ii) *Exemptions.* Include in the declaration a specific statement demonstrating that all the elements of each FOIA exemption are met.

(iii) *Segregation.* The FOIA requires that all information not subject to an exemption to the FOIA, which can be

reasonably segregated from exempt information, must be released to FOIA requesters. In any instance where an entire document is withheld, the individual authorizing the withholding must specifically address that segregation and release of non-exempt material was not possible without rendering the record essentially meaningless. If applicable, this issue must be specifically addressed in the declaration.

(iv) *Sound Legal Basis.* Army policy promotes careful consideration of FOIA requests and discretionary decisions to disclose information protected under the FOIA. Discretionary disclosures should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. The decision to withhold records, in whole or in part, otherwise exempt from disclosure under the FOIA must exhibit a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

Subpart F—Fee Schedule

§ 518.19 General provisions.

(a) *Authorities.* The FOIA, as amended; the Paperwork Reduction Act (44 U.S.C. 35), as amended; the PA of 1974, as amended; the Budget and Accounting Act of 1921 and the Budget and Accounting Procedures Act, as amended (see 31 U.S.C.); and 10 U.S.C. 2328).

(b) *Application.* The fees described in this Subpart apply to FOIA requests, and conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines. They reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents, collection of which is permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as DoD 7000.14-R, which does not supersede the collection of fees under the FOIA. Nothing in this subpart shall supersede fees chargeable under a statute specifically providing

for setting the level of fees for particular types of records. A “statute specifically providing for setting the level of fees for particular types of records” (5 U.S.C. 552 FOIA, (a)(4)(A)(vi)) means any statute that enables a Government Agency such as the GPO or the NTIS, to set and collect fees. Components should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as GPO or NTIS, they inform requesters of the steps necessary to obtain records from those sources.

(1) The term “direct costs” means those expenditures an Activity actually makes in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are stored.

(2) The term “search” includes all time spent looking, both manually and electronically, for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions thereof are responsive to the request. Activities should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the Activity and the requester. For example, Activities should not engage in line-by-line searches, when duplicating an entire document known to contain responsive information, would prove to be the less expensive and quicker method of complying with the request. Time spent reviewing documents in order to determine whether to apply one or more of the statutory exemptions is not search time, but review time.

(3) The term “duplication” refers to the process of making a copy of a document in response to a FOIA request. Such copies can take the form of paper